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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 740

THE STATE OF OHIO, ex rel. THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

Relator-Appellant,

vs.

CITY OF EUCLID, OHIO

and

M. A. SPINO,

Administrative Director of the City of Euclid

and

KENNETH J. SIMS,

Mayor of the City of Euclid

Respondents-Appellees.

BRIEF OF RELATOR-APPELLANT IN OPPOSITION TO MOTION TO DISMISS APPEAL

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Respondents-Appellees.

BRIEF OF RELATOR-APPELLANT IN OPPOSITION TO MOTION TO DISMISS APPEAL.

We respectfully submit that the Brief of Respondents-Appellees filed in support of their Motion to Dismiss the Appeal herein does not support their contention either that the appeal fails to present a substantial Federal question or that the judgment below rests upon adequate non-Federal grounds.

I. THE APPEAL PRESENTS A SUBSTANTIAL FEDERAL QUESTION.

The Brief of Respondents-Appellees argues the Motion to Dismiss as though the sole question litigated here is whether Euclid Ordinance No. 288-1956, which prohibits the issuance of street crossing permits for overhead electric lines carrying energy in excess of 33,000 volts, is con-

stitutional on its face. Nothing could be further from the real issues of this case. Relator-Appellant's case in the Ohio courts was founded on the claim that the *application* of Ordinance No. 288-1956 to deny Relator-Appellant a permit for a *particular* overhead electric line is arbitrary and unreasonable and an improper exercise of the police power because the proposed line is wholly safe and creates no danger to any part of the public. The validity of Ordinance No. 288-1956 as an abstract proposition has not been an issue.

The principal grounds of error urged by Relator-Appellant in this Court go to the manner in which the Ohio Supreme Court decided the case before it. Relator-Appellant shows in its Jurisdictional Statement that it was (a) deprived of its property without due process of law by reason of being required to place the particular high-voltage line underground at great cost, in the face of *express findings* by the trier of fact that the line in question was not a danger to the public and that the Ordinance which would deny appellant a permit for the line was wholly unrelated to the public health, public safety and public welfare, and that the denial of a permit in this case was arbitrary, unreasonable and without any rational relation to the ends for which the police power may be used, and (b) denied procedural due process because the Ohio Supreme Court took judicial notice that the electric line in question was dangerous, contrary to express findings of fact below. Moreover, the Ohio Supreme Court ruled only that Ordinance No. 288-1956 is a valid regulation. It did not decide whether the application of Ordinance No. 288-1956 to the particular facts in the Record was valid.

The Ohio Supreme Court avoided deciding whether the application of the Ordinance was valid by ruling that, as a matter of common judicial knowledge, all high-voltage

wires are dangerous. Six weeks of trial devoted almost exclusively to the presentation of evidence on the question of whether Relator-Appellant's proposed overhead electric lines would *in fact* be dangerous was thus dismissed summarily and without mention by the state court.

Whether a state appellate court can avoid ruling upon the question of the validity of the application of an Ordinance to the facts shown by the Record, by ruling that the Ordinance is valid on its face, and failing to examine or disregarding the evidence in the Record, is a substantial Federal question.

Whether a state appellate court can overrule the express findings of fact of the trier of facts on the ultimate factual question of the case, on the basis of judicial notice, presents a substantial Federal question.

We do not understand Respondents-Appellees to dispute that these are substantial Federal questions. Their Brief proceeds rather to assert a number of propositions of state law, all of which were decided adversely to their contentions by the Court of Appeals and none of which were decided or even mentioned by the Ohio Supreme Court. These propositions have no relevance to the determination of whether the Jurisdictional Statement shows substantial Federal questions or whether the decision below rests on adequate non-Federal grounds.

(a) This Court Has Power to Examine the Opinion of the Ohio Supreme Court for the Purpose of Discovering Whether Error Has Been Committed.

Respondents-Appellees assert that the Federal questions are insulated from plenary review by this Court because the syllabus of the Ohio court's decision makes no mention of judicial notice. While it is certainly true that the syllabus of an Ohio Supreme Court decision states the

law of the case, and such rule has been in effect since 1858 (not 1958 as stated in Appellees' Brief. See 5 O. S. v; Reporter's Note, 94 O. S. ix) nevertheless, it is equally true that the facts and the opinion must be examined to secure a proper understanding and explanation of the succinct statements of law contained in the syllabus.

This Court so held in *Perkins v. Benguet Consolidated Mining Co.*, 342 U. S. 437 (1952) where the relationship of syllabus and opinion was much as it is at bar. The issue there was whether a foreign corporation could be brought within the jurisdiction of an Ohio court by service upon an officer of the company within Ohio. The Supreme Court of Ohio held service to be insufficient. Its syllabus did not disclose whether the decision was founded upon state law or upon an interpretation of the Federal Constitution. This Court examined the *opinion* (which Appellees here say it may not do) and found a Federal question had been considered by the Ohio Supreme Court. The case was remanded to the state court so that it might decide whether state law closed the courts of Ohio to the litigants under the circumstances.

This Court declined to accept the premise that the Ohio Supreme Court can insulate potential error in the determination of Federal questions by omitting to mention the Federal Constitutional matter in the syllabus:

> "As we understand the Ohio practice, the syllabus of its Supreme Court constitutes the official opinion of that court *but it must be read in the light of the facts and issues of the case.*" (342 U. S. 437 at 441-442) (Emphasis supplied.)

and:

> "A syllabus must be read in the light of the facts in the case, even where brought out in the accompanying opinion rather than in the syllabus itself. See Wil-

liamson Heater Co. v. Radich, supra; Perkins v. Bright, 109 Ohio St. 14, 19-20, 141 N. E. 689, 690-691; *In re Poage*, 87 Ohio St. 72, 82-83, 100 N. E. 125, 127-128." (Note 3, 342 U. S. 437 at 442)

These quotations correctly state the law of Ohio. The syllabus does not stand alone. The opinion and the facts must be examined as well.

> "The syllabus of a decision of the Supreme Court of Ohio states the law of Ohio, but such pronouncement must be interpreted with reference to the facts upon which it is predicated and the questions presented to and considered by the Court." (Syllabus 1, *Williamson Heater Co. v. Radich*, 128 O. S. 124, 190 N. E. 403 (1934).)

Accord: *In re Poage*, 87 O. S. 72, 100 N. E. 125 (1912); *Perkins v. Bright*, 109 O. S. 14, 141 N. E. 277 (1923); *Charles A. Burton, Inc. v. Durkee*, 162 O. S. 433, 123 N. E. 2d 432 (1954).

The syllabus rule is, of course, intended to aid in the application of the doctrine of *stare decisis*. It is not a rule which precludes a reviewing court from examining the opinion to determine whether error occurred.

It is unnecessary to burden this Brief with references to Ohio practice. This Court has often stated that it will not permit state practice to stay the power of the United States Supreme Court to correct errors committed by a state court in the decision of Federal questions. *Urie v. Thompson*, 337 U. S. 163 at 172 (1949); *Reece v. Georgia*, 350 U. S. 85 at 87 (1955).

Whatever the rule might be with respect to the power of this Court to inquire into the issues and facts underlying a syllabus of the Ohio Supreme Court, it is clear that where, as here, an asserted Federal right rests upon a question of fact, this Court has power to review the record

> "This Court will review the findings of fact by a state court (1) *where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it*, and (2) where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts. [citing cases.] We make that analysis, not to determine issues of fact arising on conflicting testimony or inferences, and thus to usurp the function of the state court as a trier of the facts, but to perform our own proper function in deciding the question of law arising upon the findings which the evidence permits." (*United Gas Public Service Co. v. Texas*, 303 U. S. 123 at 143.) (Emphasis supplied.)

See *Konigsberg v. State Bar of California*, 353 U. S. 252 at 262 (1957); *Napue v. Illinois*, 360 U. S. 264 at 271 (1959).

An examination of the decision in this case makes it clear that substantial Federal questions are presented. The syllabus of the case states, first, that a municipal corporation can establish reasonable regulations for installing electric power lines and, secondly, a municipal ordinance requiring that all electric power lines of a certain size be placed underground is not an unreasonable regulation and is "* * * not unrelated to the health, safety and welfare of the inhabitants of the municipality."

In view of the express finding of fact below, that the particular line to which the Ordinance in question was being applied in this case would have no appreciable effect on the public health, safety or welfare, the decision in this case (as distinguished from the commonplace propositions of law contained in the syllabus) could be explained on only one of two grounds. The court either found that the findings of fact of the trial court were not sustained by substantial evidence (or in some other manner determined

that the facts were such as to bring the Ordinance within the terms of the syllabus) or the court concluded that it makes no difference what the specific facts are. We look to the opinion for an explanation.

We find from the opinion that the court held it did not make any difference what the specific facts were because it took judicial notice that the true facts were contrary to the express findings of fact.

Either ground presents a substantial Federal question of due process of law, as is shown by the cases cited in the Jurisdictional Statement.

(b) The Availability of the Remedy of Mandamus, While a Non-Federal Question, Is Not a Part of this Case.

Appellees' contention of no substantial Federal question appears to rest in large part upon its claim that the ultimate question to be determined is whether a writ of mandamus shall issue by one of the courts of appeals of Ohio. They contend that the question of whether such court has jurisdiction to issue a writ of mandamus is a state and not a Federal question. But no question is presented to this Court relative to the power of an intermediate appellate court in Ohio to issue a writ of mandamus in the case at bar. Nor is the question of propriety of mandamus a question here.

The Court of Appeals ruled that mandamus was the proper remedy and that it had power to issue the writ (Appendix to Jurisdictional Statement A 112-133; A 134). Although virtually the sole argument of Appellees in the Ohio Supreme Court was that Relator had mistaken its remedy, that question was not adverted to or decided by the Supreme Court of Ohio. Rather, that court assumed the propriety of the remedy and decided the case on police

power grounds. The decision does not rest in any part upon the procedural grounds here suggested.

In point of fact, the Ohio Supreme Court decided the procedural point urged by Respondents-Appellees adversely to their contention just two weeks before it issued its original decision in this case. *State ex rel. The Killeen Realty Company v. City of East Cleveland*, 169 O. S. 375, 160 N. E. 2d 1 (1959).

Appellant is not trying here to attack the validity of the Ordinance through which it claims as is suggested by Appellees' Brief. The application of the Illuminating Company for a permit was filed pursuant to the terms of Ordinance No. 32 and not pursuant to Ordinance No. 288-1956. This was settled in the Court of Appeals and was not any part of the decision of the Ohio Supreme Court. The Court of Appeals found that Ordinance No. 32 granted Relator "a franchise contract in perpetuity" (Appendix to Jurisdictional Statement, A-35).

(c) The Right of the Relator-Appellant to Occupy the Streets of the City of Euclid Rests on Federal Constitutional Grounds.

Appellees make the bald assertion that whether or not Relator-Appellant can occupy any of the streets of the City of Euclid is a non-Federal question. This claim was made in both state courts. The Court of Appeals ruled that Ordinance No. 32 granted Relator-Appellant a perpetual franchise contract and amounted to municipal consent to the occupation of the streets by Relator-Appellant's poles. The only limitation on this consent is that the City may enact reasonable police regulations governing the occupancy of the streets by Relator-Appellant. (Appendix to Jurisdictional Statement, A-35.) The Ohio Supreme Court assumed that such was correct interpretation of

the effect of Ordinance No. 32 and addressed its entire attention to whether Ordinance No. 288-1956 was, on its face, a lawful regulation.

The issue at bar is whether the particular regulation, in its application to the facts shown by the Record, is so arbitrary and unreasonable as to amount to a deprivation of Relator-Appellant's property without due process of law. This is a Federal question and it is the primary question litigated. Appellees can not now inject the issue of consent into the case.

II. THE DECISION BELOW DID NOT REST UPON ANY NON-FEDERAL GROUND, ADEQUATE OR OTHERWISE.

The sole question decided by the Ohio Supreme Court was whether Ordinance No. 288-1956, as amended, is a reasonable police power regulation. It considered no state law questions.

Respondents-Appellees' contention that the decision below rests upon an adequate non-Federal ground appears to be based upon a claim that certain conditions of Appellant's franchise contract precedent to the granting of a permit for the erection of lines in the streets, were not complied with, and that the question of the interpretation of such condition precedent is a matter of state law. Without getting into the question of whether, in a given case, the interpretation of a specific provision of a franchise contract is a question of Federal law (which it most certainly is in some cases, *Ohio Public Service Co. v. State ex rel. Fritz*, 274 U. S. 12; *Northern Ohio Traction & Light Co. v. State ex rel. Pontius*, 245 U. S. 574) the questions raised by Respondents-Appellees relate to compliance with conditions precedent in the franchise ordinance, such as whether the insulation was appropriate or whether proper plans were filed. The trial court expressly found in favor of

Relator-Appellant on each and every one of these issues. Undoubtedly, whether these be questions of Federal or state law, the Ohio Supreme Court *could have* overruled the Court of Appeals on these matters. It did not. The Supreme Court of Ohio neither examined nor mentioned nor rested their decision in any way upon such easily remedied grounds.

Respondents-Appellees also assert that the decision rests upon adequate non-Federal grounds by reason of the fact that several state courts have upheld ordinances requiring high-voltage electric lines to be placed underground. In only one of the cited cases was the question of the validity of the *application* of such an ordinance to a particular state of facts presented. In that case, *Bell Telephone Company of Pennsylvania*, 138 Pa. Super. 527, 10 A. 2d 817 (1940), the court did exactly as Relator-Appellant insists the Ohio Supreme Court should have done. It examined the Record and found, *from the weight of the evidence*, that there was a substantial danger presented by the lines in question and the application of the ordinance to require the line to be placed underground was upheld.

> "*A careful reading of all the evidence convinces us that it is sufficient to support the findings.* There was evidence that wires had interfered in the efficient control of a fire that had damaged two buildings in this borough, and in addition there was opinion evidence of individuals, with experience as firemen, that the wires would in the future necessarily interfere in combatting fires or in removing persons from burning buildings." (10 A. 2d 817, 819) (Emphasis supplied.)

Where the attention of an appellate court has been addressed to the question of whether a statute or ordinance prohibitive of overhead electric wires is related to

the proper uses for which the police power may be exercised, the courts have unanimously (with the exception of the Ohio Supreme Court in the principal case) addressed themselves to whether the evidence supports the reasonableness of the regulation in its application to the facts before it. See *Long Island Lighting Co. v. Village of Old Brookville*, 84 N. Y. S. 2d 385 (Sup. Ct. Special Term, Queens County); *Postal Telegraph-Cable Co. v. Ingraham*, 228 F. 392 (D. Me. 1915); *City of Plattsmouth v. Nebraska Telephone Co.*, 80 Neb. 460, 114 N. W. 588 (1908); *Northwestern Telephone Exchange Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69 (1900); *Rockland Electric Co. v. Borough of Montvale*, 104 N. J. L. 480, 141 A. 673 (1928). A like rule is applied by Public Utilities Commissions. See *In re Boston Edison Co.*, 79 PUR N. S. 1 (Mass. D. P. U. 1949); *Property Owners of Westchester County v. Westchester Lighting Co.*, 1932C PUR 503 (1932).

The fact that these states have decided the due process and police power questions adversely to the contentions of Respondents-Appellees and to the decision of the Ohio Supreme Court herein goes far towards establishing the substantiality of the Federal questions.

CONCLUSION.

It is apparent from the Jurisdictional Statement and even from the Brief of Respondents-Appellees in support of the Motion to Dismiss, that substantial Federal questions exist and that the decision of the court below did not rest on any non-Federal basis The Supreme Court of Ohio decided (1) that the Ordinance is valid on its face although the question litigated was whether the application of the ordinance to a specific electric line was a denial of Federal due process and (2) that, in spite of express

findings of fact to the contrary based upon substantial evidence in the court below, as a matter of judicial notice all electric lines are dangerous to the public.

It is respectfully submitted that the Jurisdictional Statement shows substantial Federal questions. The Motion to Dismiss should be overruled and probable jurisdiction should be noted.

Respectfully submitted,

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